NO. 84828-9

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY,
husband and wife,

Respondents,

vs.

KENNETH W. GRAVES and KAREN R. GRAVES,
Trustees of the Graves Family Trust; and all other persons
or parties unknown claiming any right, title, estate, lien,
or interest in the real estate described in the complaint herein,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Statutes

Other Authorities

A. INTRODUCTION

The brief of William Kiely and Sally Chapin-Kiely (collectively "the Kielys") offers no real reasons why this Court should not reverse the trial court order quieting title to the alley in the Kielys. The Kielys misunderstand the key issue and thus ignore well-established authority from this Court reiterating the fundamental principle that municipal interests in real property cannot be adversely possessed. They also misconstrue the applicable law in an attempt to justify the trial court's erroneous decision.

This Court should reject the Kielys' arguments where the City of Port Townsend ("City") had a fee simple interest in the alley and it conveyed that interest to Ken and Karen Graves (collectively "Graves") when it formally vacated the alley in 2009. The trial court's erroneous decision to quiet title to the alley in the Kielys despite the City's unimpaired title will impact not only Graves, but will also have serious repercussions for nearly every city and town in Washington.

The Court should reverse and vacate the trial court judgment quieting title to the alley in the Kielys. Alternatively, if the Court chooses to affirm the Kielys' adverse possession of the alley, it should reverse the judgment and remand the case to the trial court with directions to confine

the scope of the Kielys' interest in the servient estate to the alley easement to only the portion they adversely occupied.

B. RESPONSE TO THE KIELYS' STATEMENT OF THE CASE[1]

A close reading of the Kielys' statement of the case confirms that the parties largely agree on the underlying facts. *Compare* Br. of Appellants at 4-7 *with* Br. of Resp'ts at 2-6. But the Kielys make several important concessions worth repeating here:

The Kielys implicitly acknowledge significant gaps in the time of possession fatal to their adverse possession claim when referring to the applicable timeline. Br. of Resp'ts at 3-4. For example, Daniel Blood ("Blood") owned property abutting the alley from approximately 1981 to 1987 and may have used the alley during that time period. RP I:64-65.[2] But he did not personally know the alley's history when he lived at the property or what occurred on the alley after he moved out. RP I:71, 76. There is no evidence in the record concerning the alley's use from 1987 to 1993. Carol Cahill ("Cahill") moved onto the property in 1993 and lived there until 1997. RP I:47. But there is no evidence in the record

[1] Graves wish to correct the citations to the record in footnote 5 of their opening brief. The citations to CP 180-81 and CP 202 should actually be citations to RP I:180-81 and RP I:202. They apologize for any inconvenience or confusion.

[2] "RP I" refers to the April 5, 2010 verbatim report of proceedings. "RP II" will refer to the April 6, 2010 verbatim report of proceedings. The number after the volume designation refers to the specific page where the testimony appears.

concerning the alley's use after she left. Duncan Watters ("Watters") did not testify at trial concerning his use of the alley. There is an evident gap in the time of possession between 1987 and 1993 and again between 1997 and 2000, when the Kielys purchased the property.

The Kielys concede they did not maintain Watter's garden. Br. of Resp'ts at 4. They also admit they mowed and weed-whacked only a small portion of the alley, but did not maintain the entire alley. *Id.* at 4-5.

Finally, the Kielys admit they took no steps to assert their claimed interest in the alley until after the City vacated it and Graves had expended thousands of dollars in the vacation proceedings. *Id.* at 5-6.

C. ARGUMENT IN SUPPORT OF REPLY

The dispositive issue before the Court is the quantum of title held by the City following the Powers' dedication of the alley to the public for its use forever as a public thoroughfare. The Kielys misunderstand the importance of this issue because they spend more time arguing the elements of adverse possession than addressing long-standing case law holding that lands owned by municipalities in a governmental capacity cannot be acquired through adverse possession. Any argument concerning the elements of adverse possession is immaterial where the City's title could not be impaired.

(1) The Trial Court Erred by Holding the City's Interest in the Alley Could Be Adversely Possessed

a. Land held by a municipality cannot be acquired through adverse possession

For hundreds of years, this Court has repeatedly stated the fundamental principle that land held by a municipality in its governmental capacity cannot be acquired through adverse possession. *See, e.g., Commercial Waterway Dist. No. 1 of King County v. Permanenete Cement Co.*, 61 Wn.2d 509, 511, 379 P.2d 178 (1963); *Mueller v. City of Seattle,* 167 Wash. 67, 75, 8 P.2d. 994 (1932); *Town of West Seattle v. West Seattle Land & Improvement Co.*, 38 Wash. 359, 80 P. 549 (1905). *See also*, RCW 7.28.090. This is technically because the statute of limitations will not run against the government. RCW 4.16.160.[3]

A public street is held and controlled by a municipality in a purely governmental capacity. *Gustaveson v. Dwyer*, 83 Wash. 303, 311, 145 P. 458 (1915). This Court has, for all practical purposes, treated alleys the same as roads, highways or streets. *Burkhard v. Bowen*, 32 Wn.2d 613, 620, 203 P.2d 361 (1949). Thus, title may not be adversely obtained to a

[3] Government immunity from statutes of limitation protects the public from suffering for the negligence of its representatives, and allows the state to allocate its resources to uses other than vigilance about inchoate claims. *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 114, 691 P.2d 178 (1984) (quoting *United States v. Thompson*, 98 U.S. 486, 489-90, 8 Otto 486, 25 L.Ed. 194 (1878)). It also protects the public from the costs of legal fees, awards, and insurance coverage that accompany lawsuits against the government. *Gorman v. City of Woodinville*, ___ Wn. App. ___, ___ P.3d ___ (2011) (citing Laws of 1986, ch. 305, § 100 (preamble)). Permitting the Kielys to adversely possess the alley weakens the policies underlying the statute.

platted public street or alley, though it may be possible to obtain title if the public way has been vacated. *Mueller*, 167 Wash. at 75-76; *Tamblin v. Crowley*, 99 Wash. 133, 138-39, 168 P. 982 (1917). This is a critical distinction the Kielys and the trial court failed to make.

b. The Kielys could not adversely possess the alley because the City held fee simple title to it

The Kielys agree that no one can adversely possess publicly owned property. Br. of Resp'ts at 8. Yet they argue they adversely possessed the alley because the City held only an easement over it while Graves retained the underlying title to it. *Id.* at 8-11. The Kielys are mistaken. The City held fee simple title to the alley, which prevented the Kielys from adversely possessing it.

The first major flaw in the Kielys' argument is that they ignore the distinction between a common law dedication and a statutory dedication. As Graves mentioned in the opening brief at 13 n.10, there are two types of dedications: common law and statutory. Determining the type of dedication is critical because the type of dedication determines the interest acquired: fee simple title or only an easement. *See City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 206 P.2d 277 (1949); 26 C.J.S. *Dedication*, §§ 2, 68. Under a common law dedication, the public does not acquire a fee in the land, but simply the right to use it for

the purposes for which it was dedicated. 11A Eugene McQuillin, *The Law of Municipal Corporations*, § 33.72 (3rd ed.). The fee remains in the owner who holds it subject to the easement vested in the public. *Id.* By contrast, a statutory dedication conveys title in fee simple to the government. *Id.*; 23 Am Jur.2d, *Dedication* § 55 (2d ed.).

Certain formalities of execution and recording are required for statutory dedications. *See City of Seattle v. Hill*, 23 Wash. 92, 96-97, 62 P. 446 (1900). In a statutory dedication, the owner's intent to dedicate is evidenced by presentment for filing of a final plat or short plat showing the dedication on the plat. 6 Judith A. Shulman, *Wash. Real Property Deskbook*, § 91.3(1) (3d Ed.). Acceptance by the public is evidenced by approval of the plat. *Id.*

Here, the Powers "dedicated to the public for its use forever as public thoroughfares the streets and alleys as shown on this plat." Ex. 27; RP II:43. This is an express dedication and there is no evidence of a contrary intent. *See Nelson v. Pacific County,* 36 Wn. App. 17, 21, 671 P.2d 785 (1983), *review denied,* 100 Wn.2d 1037 (1984). The City accepted the offer when it recorded the plat. The Powers' express statutory dedication thus conveyed fee simple title to the City. *See State v. Spokane Street Ry. Co.*, 19 Wash. 518, 532, 53 P. 719 (1898) (citing *City of Des Moines v. Hall,* 24 Iowa 234 (1868)). Moreover, RCW 58.08.015

states that every donation to the public, as noted on a plat, becomes a quitclaim deed to those named as donees for their use. *See also, Roundtree v. Hutchinson*, 57 Wash. 414, 415, 107 P. 345 (1910) (noting a statutory dedication is equivalent to a "grant"); *Burmeister v. Howard*, 1 Wash.T. 207, 212 (1867) (in making the plat of the town of Olympia, the dedicator made a quitclaim deed to the public); RCW 64.04.060 (noting all conveyances not limiting the estate conveyed are conveyances of an estate in fee simple). The Kielys attempt to sidestep application of the statute by arguing it does not address how streets and alleys are platted, but instead identifies what warranties would attach to the conveyance. Br. of Resp'ts at 11 n.7. They are mistaken. As this Court noted in *Miller v. King County*, 59 Wn.2d 601, 605, 369 P.2d 304 (1962):

> The legislature's reference to a quit claim deed . . . must be construed to mean that . . . the words "donate, grant and dedicate" are to be regarded as a quit claim deed and *divest the owner of all interest in the property.*

The Powers' statutory dedication thus conveyed a fee simple interest in the alley to the City and divested them of all interest in it.

The second major flaw in the Kielys' argument is that they misconstrue the applicable law in an effort to justify the trial court's erroneous decision. Br. of Resp'ts at 8-11. They contend this Court has not departed from the rule first established in *Burmeister* and reiterated in

Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968), that the fee in a public street remains in the owner of the abutting land and that the public acquires only an easement. Br. of Resp'ts at 8, 10. Even if true, which Graves disputes, this is the minority view. The rule adopted by statute in a majority of other jurisdictions is that a statutory dedication of a street or alley conveys fee simple title to the municipality. *See* Annotation, "*Validity and Construction of Regulations as to Subdivision Maps or Plats*," 11 A.L.R. 2d 524 (1950) at § 6(b). *See also, Stecklein v. City of Cascade*, 693 N.W.2d 335, 338-40 (Iowa 2005) (holding the city had fee simple title to the streets that were dedicated to it for public use).

Moreover, the cases that created the alleged presumption in favor of an easement interest are not pictures of clarity with respect to the law or the facts. Most present unusual and distinct fact patterns with respect to the title of the land in dispute not present here. Thus, the Court should properly distinguish *Burmeister* and its progeny and find them inapplicable here.

In *Finch*, this Court affirmed the trial court's decision quieting title to property in favor of private plaintiffs as against the City of Seattle, the successor in title to King County. The Court concluded Seattle was equitably estopped to assert that its claim to the property was superior to that of the plaintiffs. The Court arrived at this conclusion because it found

that the actions the County took were within the general powers granted to it, even though they were exercised in an irregular and unauthorized manner. The County's actions were not substantively ultra vires, but procedurally ultra vires. *Id.* at 171, 173-74.

Another distinguishing feature of *Finch* is the type of property interest at stake. There, the County had made plans to open a street or highway between the property owned by Matthews and the platted area previously dedicated to the public for a street; however, the County engineer determined it was not feasible to construct a highway on the property. The County thus sought to acquire a road-right-of way over a portion of Matthews' property. The County eventually acquired the right-of-way through an exchange agreement. Thus, Seattle, as a successor to the County, specifically acquired only a road right-of-way.

In *Burmeister*, Howard and Burmeister owned land on opposite sides of an alley in Block 13 of the town of Olympia dedicated by their common grantor. 1 Wash. T. at 208. Prior to the lawsuit, Howard, Burmeister, and the other property owners in Block 13 petitioned the Olympia Board of Trustees ("Board") to vacate the alley, to annex the west seven feet to the owners in that block fronting Main Street, and to divide the remaining three feet equally between the lot owners on both sides of the alley. The Board passed an ordinance vacating the alley and

annexing it as the owners requested. The Board ordered the plat of the town to be changed to reflect the new lot lines. Thereafter, Howard brought suit to establish his right to one half of the land adjoining his property, which had formerly been a part of the alley. The trial court entered a judgment in Howard's favor and Burmeister appealed.

This Court referred generally to both the law of dedications and the doctrine of easements and then made its pronouncement that "when an easement is taken as a public highway, the soil and free-hold remain in the owner of the land encumbered only with the right of passage in the public[.]" *Id.* at 211. The Court then moved on to an analysis of the existing statute relating to the vacation of streets and alleys. *Id.* at 212. It determined the municipality held the title in trust for the public because the law provided that on the vacation of streets and alleys, the soil must go in equal proportions to the adjacent lot owners. *Id.* The Court held that by joining in the petition to make a different division of the land, Howard estopped himself from asserting the right which he formerly had under the statute.

What is unusual about *Burmeister* is that the Court did not determine whether the dedication was an easement or a fee simple estate. It did not recite the dedication language in the plat or determine the dedicator's intent with respect to the alley. In fact, *Burmeister* did not

even involve a claim of an easement. *Humphrey v. Jenks*, 61 Wn.2d 565, 379 P.2d 366 (1963). Thus, the purpose of the Court's pronouncement with respect to easements is confusing to say the least. Moreover, it appears from the facts that the original dedicator may have conveyed at least a portion of the alley to both Howard and Burmeister notwithstanding the dedication of the alley in the plat to the municipality. This would be evidence of the dedicator's intent to transfer less than a fee simple estate in the alley, which stands in sharp contrast to the Powers' express intent here.

The Kielys similarly argue *Erickson Bushling, Inc. v. Manke Lumber Co.*, 77 Wn. App. 495, 891 P.2d 750 (1995) controls. Br. of Resp'ts at 13-14. But like *Finch*, *Erickson* is not analogous and does not control for a crucial reason: the plat in *Erickson* expressly dedicated a 60-foot *easement* for a county road. By contrast here, the Powers expressly dedicated fee simple title to the City rather than a mere easement. In analyzing the applicable law, the *Erickson* court remained cognizant of the fact that property to which a municipality had *title* could not be adversely possessed. *Id.* at 498-99.

Moreover, the road in *Erickson* was vacated by operation of law five years after its dedication pursuant to RCW 36.87.090. This distinction is significant because that statute, by its terms, does not apply

to any alley that lies within a city and dedicated by plat. When the dispute arose between Erickson and Manke, the county road had been vacated for more than 50 years. That is not the case here. The City retained title to the alley until it was vacated and conveyed to Graves in 2009.

Washington should follow the majority rule that a statutory dedication conveys title in fee simple to the government unless the language in the plat indicates an intent to convey something less than a fee simple estate. Moreover, the Court should not *automatically* assume the dedication of a street or alley universally creates an easement as the Kielys suggest. Br. of Resp'ts at 15. Instead, its decision should turn on a case-by-case examination of the language in the plat itself since the intention of the dedicator controls. *See, e.g., Cummins v. King County*, 72 Wn.2d 624, 626, 434 P.2d 588 (1967). *See also, Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996) (noting cases deciding whether a railroad deed conveys fee simple title or an easement were in disarray and usually turned on a case-by-case analysis of each deed). The plat's language is "best evidence" of the dedicator's intent. *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 366, 494 P.2d 996, *cert. denied*, 409 U.S. 983 (1972).

(2) <u>If Powers' Declaration Conveyed an Easement Interest, Graves Retain that Interest</u>

Continuing to assume the City held only an easement in the alley, the Kielys next argue they were entitled to a fee simple interest, even though they also argue the Powers' dedication only conveyed an easement interest, because Graves did not hold a reversionary interest or a possibility of reverter in the easement; the Kielys' predecessors had already adversely possessed it by 1981. Br. of Resp'ts at 16. The Kielys present no evidence concerning the use of the alley prior to 1981. Moreover, they continue to ignore well-established case law on the issue.

An adverse possession claim cannot be asserted against a reversionary interest or a remainder interest until the future interest becomes a vested interest. *Martin v. Walters*, 5 Wn. App. 602, 490 P.2d 138 (1971); *Northwestern Indus., Inc. v. City of Seattle*, 33 Wn. App. 757, 760, 658 P.2d 24, 27 (1983). Holders of a future interest, including those who have only a remainder or reversionary interest, cannot be dispossessed by the record owner's failure to take action to prevent adverse possession. *See Martin*, 5 Wn. App. at 604 (citing *Mielke v. Miller*, 100 Wash. 119, 124, 170 P. 143 (1918)).

Here, the City was under no obligation to vacate the alley. Until the City chose to do so, it held title to the alley in trust for the public. *See Burmeister*, 1 Wash.T. at 212. Only when the alley was formally vacated would it vest in equal proportions in the adjacent lot holders. *Id.* This is

consistent with the plain language of RCW 58.17.212, which states that at the time of vacation, "title shall vest" with the rightful owner as shown in the public record. The triggering event vesting title is thus the formal vacation. Had the City not vacated the alley, Graves would have had no interest to dispossess by adverse possession. Until the formal vacation occurred, Graves held only a possibility of reverter in the alley.

The Kielys' adverse possession claim could not be asserted against the City while it owned the alley because any possession by them adverse to the City was meaningless because the City's title could not be impaired. *See Finley v. Jordan*, 8 Wn. App. 607, 508 P.2d 636, *review denied*, 82 Wn.2d 1006 (1973). Where the City's title was unimpaired and the City conveyed its title to Graves, they acquired title unimpaired by any possession adverse to the City. That being so, the 10-year statute of limitations could not begin to run until Graves acquired title to the alley in March 2009 following the formal vacation.[4]

(3) The Kielys Did Not Adversely Possess the Alley

As noted *supra*, the City held fee simple title to the alley following the Powers' statutory dedication; thus, any argument concerning the

[4] The Kielys assert the City's vacation of the alley may have been improper. Br. of Resp'ts at 5 n.5. On the contrary, there is a presumption that an ordinance vacating a street was validly enacted for public purposes. *See* RCW 35.79.010; *Hoskins v. Kirkland*, 7 Wn. App. 957, 959-60, 503 P.2d 1117 (1972). *See also, Burmeister*, 1 Wash.T. at 212.

elements of adverse possession is immaterial where the City's title could not be impaired. But even if the City held only an easement over the alley and Graves retained the title to it, the Kielys did not adversely possess it because they failed to establish all of the necessary elements of adverse possession relating to the servient estate of the easement entitling them to possession.

Although the Kielys correctly state the elements required to prove adverse possession, Br. of Resp'ts at 20, they fail to acknowledge that the burden of proving each element rests with them. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757-58, 774 P.2d 6 (1989); *Woehler v. George*, 65 Wn.2d 519, 524, 398 P.2d 167 (1965). "The presumption is in the holder of the legal title[.]" *Hunt v. Matthews*, 8 Wn. App. 233, 238, 505 P.2d 819 (1973), *overruled on other grounds in Chaplin v. Sanders*, 100 Wn.2d 853, 862, 676 P.2d 431 (1984) (noting traditional presumptions still apply). They cannot meet their burden.

As Graves noted in their opening brief at 22, the Kielys' intention to claim title to the alley must have been objectively exhibited. It was not. They did not construct a fence to define the alley as part of their property nor did they make any effort to exclude the public. There is no evidence the public was permitted on the alley only as the Kielys' invitee or that it was only their guests who used the alley for parking. The Kielys' use was

merely incidental to the alley's public character. Their supposed occupancy by means of mowing or weed-whacking is not sufficient to establish this element of adverse possession because that activity could be viewed as an act of neighborly accommodation. *See Mesher v. Connolly*, 63 Wn.2d 552, 556, 388 P.2d 144 (1964). In any event, Sally Chapin-Kiely testified she did nothing to maintain the original gardens planted in the area and let them go fallow. RP I:161.

The Kielys concede they must tack to their predecessors' uses to satisfy the time requirement. Br. of Resp'ts at 20. This dependence is fatal to their claim. Contrary to the Kielys' assertions, their possession was not actual and uninterrupted for more than 30 years because there are significant gaps in their timeline. There is no evidence in the record concerning the use of the alley prior to 1981. Blood owned property abutting the alley from approximately 1981 to 1987. RP I:64-65. But he did not personally know the alley's history at the time he lived at the property or what occurred on it after he moved. RP I:71, 76. While he may have used the alley during that time, there is no evidence in the record concerning the alley's use from 1987 to 1993, when Cahill moved onto the property. RP I:47. Cahill lived at the property until 1997. *Id.* Watters, with whom Cahill lived for a time and who remained at the property after she left, did not testify at trial. There is an evident gap in

time between 1987 and 1993 and again between 1997 and 2000, when the Kielys purchased their property.

These clear breaks in possession stop the statutory time period and abandon any adverse possession. 17 William B. Stoebuck and John W. Weaver, *Wash. Practice Series, Real Estate: Property Law*, § 8.17. A break in a period of possession cannot be added to the following time period. *See id.* Thus, neither the Kielys nor their predecessor's possessed the servient estate of the alley easement for the required 10-year period assuming arguendo that they could have impaired the City's title in the first place.

As Graves noted in their opening brief at 18, property must be used beyond the use it would receive because it was handy and convenient; instead, it must be utilized and exploited as by an owner answerable to no one to satisfy this element of an adverse possession claim. Here, the Kielys' possession of the servient estate to the alley easement was not exclusive because it was merely convenient and incidental to their proximity to the alley.

The Kielys assert their use of the servient estate to the alley easement was adverse because they used it and did not ask permission to do so. Br. of Resp'ts at 34. But mere use without permission is not sufficient to establish adverse use. *Cullier v. Coffin*, 57 Wn.2d 624, 628,

358 P.2d 958 (1961). In *Cullier*, the claimants asserted a prescriptive easement to use an orchard road owned and used by their neighbors. The claimants did not ask permission and established use for the prescriptive period. This Court concluded the unchallenged use was but one circumstance from which an inference of adverse use might be drawn. *Id.* at 627. It also concluded the identity of the person who made and used the road was another consideration to be examined, explaining that where the owner shares use of the road with the claimant, there is an inference of neighborly accommodation. *Id.* Significantly, the Court held that "[t]he fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive under the circumstances." *Id.* at 626.

In developed land cases like this one, an inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or accommodation. *Imrie v. Kelley*, ___ Wn. App. ___, ___ P.3d ___ (2010) (citing *Drake v. Smersh*, 122 Wn. App. 147, 154, 89 P.3d 726 (2004)). But a use that is permissive at its inception cannot ripen into a prescriptive right, no matter how long the use may continue, "unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942).

Graves contended in their opening brief at 24 that the Kielys' use was not hostile where they acknowledged the City's superior title by seeking a parking permit. Moreover, Cahill testified she thought the City owned the alley and that it could kick her out at anytime "because it [the alley] was a public right of way[.]" RP I:56. The Kielys contend without authority that this argument is a red herring. Br. of Resp'ts at 34. On the contrary, any action recognizing explicitly or implicitly the superior title of another negates a claim of hostile use.

Jackson v. Pennington, 11 Wn. App. 638, 525 P.2d 822, *review denied*, 84 Wn.2d 1013 (1974), supports Graves' position. *Jackson* involved a claim for adverse possession against property formerly held by Seattle for a public esplanade. Seattle held title to the land in question. The Jacksons owned a small cottage that had been built almost entirely on land within the esplanade. When they sought a building permit to expand the cottage, Seattle informed them that because the cottage was on land designated for a street, it would require a permit to use the street before issuing the building permit. The Court of Appeals held that by applying for the permit, the Jacksons had recognized Seattle's superior title, thereby failing to establish the element of hostility for the 10-year statutory period required for adverse possession. *Id.* at 646.

Where the Kielys cannot satisfy all four elements of adverse possession, their claim fails and they cannot acquire title to the alley. But even if this Court determines the Kielys could impair the City's title through adverse possession and that they satisfied their burden, the Kielys are not entitled to possession of the *entire* servient estate to the alley easement. There is no evidence in the record that anyone ever used the back 30 ft. of the alley. Blood testified that he could only push his trailer so far back into the alley because of the brambles. RP I:75. Similarly, Cahill testified that she utilized only a portion of the alley for her gardens and that no one used another small portion to the eastern side of the alley. RP I:51, 62-63. Even the Kielys both testified they never used the back third of the alley and never maintained it. RP I:161, 165.

Given this testimony, the Kielys did not occupy the entire servient estate to the alley easement in the manner required to make its *entire* possession adverse. *See Taylor v. Talmadge*, 45 Wn.2d 144, 149, 273 P.2d 506 (1954), *overruled on other grounds by Chaplin*, 100 Wash.2d at 861 n.2. At a minimum, the Court should narrow the scope of the Kielys' interest to only the portion of the servient estate of the alley easement they actually occupied.

D. CONCLUSION

This Court has repeatedly stated that land held by a municipality in its governmental capacity cannot be acquired through adverse possession. The Powers' statutory dedication conveyed a fee simple interest in the alley to the City, which bars the Kielys' adverse possession claim. The trial court's erroneous decision to quiet title to the alley in the Kielys despite the City's unimpaired title will impact not only Graves, but also nearly every city and town in Washington.

Even assuming for the sake of argument that the City held only an easement over the alley and Graves retained the title to it, Graves continued to retain the alley easement. Moreover, the Kielys did not adversely possess the servient estate to the alley easement because they failed to establish all of the necessary elements of adverse possession. In any event, they did not occupy the entire servient estate to the alley easement in the manner required to make its *entire* possession adverse.

Accordingly, the Court should reverse and vacate the trial court's judgment and decree. At a minimum, the Court should narrow the scope of the Kielys' interest. Graves retain the easement interest. The Kielys, to the extent they have any interest in the servient estate to the alley easement, should be confined to only the portion they adversely occupied. Costs on appeal should be awarded to the Graves.

DATED this 7th day of April, 2011.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed and deposited in the US Mail a true and accurate copy of the following document: Reply Brief of Appellants in Supreme Court Cause No. 84828-9 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 7, 2011, at Tukwila, Washington.

Christine Jones
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